FOR ARGUMENT

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Nos. 86-497 and 86-531

In the Supreme Court of the United States

October Term, 1986

AGENCY HOLDING CORPORATION, *et al.*,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

CROWN LIFE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS IN NO. 86-497

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ARGUMENT

I. Respondent Malley-Duff Has No RICO Cause Of Action For The Termination Of Its Agency Contract Because This Alleged Injury Was Not Caused "By Reason Of" A RICO Violation.

Malley-Duff argued in the circuit court[1] and admits in its brief to this Court[2] that when its agency contract was terminated no pattern of racketeering activity had been committed by defendants. It follows that Malley-Duff does not have a RICO cause of action for its termination injury because this injury was not "by reason of" a RICO violation. 18 U.S.C. §1964(c). Malley-Duff may have other causes of action for its termination, and in fact has alleged many,[3] but it does not have a RICO cause of action.

In *Sedima, S.P.R.L. v. Imrex Company, Inc.*, ____ U.S. ____, 105 S. Ct. 3275 (1985), this Court rejected the dissenting Justices' position that a RICO plaintiff must be able to prove a "racketeering" injury causally traceable to a confluence of the elements of a RICO violation, but the Court preserved the requirement that a RICO plaintiff must be able to causally trace its injury to an existing RICO violation. The *Sedima* majority held that:

> [T]he plaintiff only has standing if, and can only recover [under RICO] to the extent that, he has been

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[1]Malley-Duff's Brief in the Third Circuit, pp. 32-34.

[2]Malley-Duff's Brief, p. 34, n.38.

[3]*I.e.*, antitrust, breach of contract, tortious interference, common law conspiracy to tortiously interfere. Plaintiff may even have had a RICO conspiracy action under §1962(d). Any such RICO conspiracy action for the termination of plaintiff's agency contract is barred by the appropriate two-year Pennsylvania statute of limitations. See our principal brief at pp. 15-29 and 35-36.

> injured in his business or property *by the conduct constituting the violation.* As the Seventh Circuit has stated, '[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct' . . . .

105 S. Ct. at 3285-86 (citation omitted: emphasis added).

The fundamental division between the majority and the dissenting Justices in *Sedima* was that the majority felt that RICO was intended to provide a RICO cause of action for plaintiffs whose injuries were "proximately caused by the [conduct] forbidden" by RICO, and not just for plaintiffs whose injuries indirectly flowed therefrom. 105 S. Ct. at 3286, n.15. There was no disagreement between the majority and the dissent that all RICO plaintiffs must be able to prove that their injuries were caused by a RICO violation. This is what Malley-Duff has admitted that it is unable to do with respect to its termination injury.

Malley-Duff argues that its termination injury was caused by a RICO predicate offense, and that predicate offenses which occurred later established a pattern. As the *Sedima* majority makes clear, this is not enough to give Malley-Duff a RICO action for its termination; committing a predicate offense is not a RICO violation:

> Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of §1962, *nor is mere commission* of the predicate offenses.

105 S. Ct. at 3285 (emphasis added).

> A violation of §1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Id. (footnote omitted).

> [P]laintiff has standing if, and can only recover (under RICO) to the extent that, he has been injured in his business or property *by the conduct constituting the violation.*

Id. at 3285-86 (emphasis added).

Sedima held that a plaintiff who can causally trace its injury directly to a predicate offense which is part of an existing, completed RICO violation, or indirectly to a confluence of RICO's elements, can recover under RICO.

A plaintiff, like Malley-Duff, who cannot causally trace its injury to an existing RICO violation has no RICO action. This is so because causation, as we stated in our brief to the Third Circuit, is a time-bound concept. Something that occurs after an event can never be said to have caused it. Something that occurs after a plaintiff is injured can never be said to have *caused* the injury. A plaintiff injured by a RICO predicate act before a pattern of such activity has occurred will never be able to contend that he has been injured in his business or property "by reason of" a substantive RICO violation. There is simply no way for a plaintiff who cannot prove the existence of a completed RICO violation as of the time it was injured to causally trace its injury to a substantive *RICO violation.* Any other construction would effectively read the "by reason of" language out of the RICO statute or eliminate any causal significance which the phrase was obviously intended to have. We have found no interpretation of a federal statute containing "by reason of" language that does not equate this "plain language"[4] to a causation requirement.[5]

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[4] *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 (1982).

[5] *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-36 (1983) ("There is a

(Continued on next page)

Any other construction would also be discordant with Congress' purpose in enacting RICO. Congress' purpose in the RICO statute was to attack organized crime. The threat to society posed by organized crime is simply not presented by individuals who have not yet completed a substantive RICO violation or a RICO conspiracy violation.

As we argued in our principal brief, the complex statutory provisions in RICO §§1961 and 1962 setting forth what constitute a substantive RICO violation and a RICO conspiracy can usefully be viewed as Congress' definitions of what it takes for a person to be part of organized crime and therefore subject to RICO's enhanced sanctions. Congress can be seen to have created in the RICO statute a definition of a RICO defendant comparable to the repeat offender status created by repeat offender statutes.

Sedima can be viewed as holding that RICO's enhanced penalties, both civil and criminal, are not available against defendants who have not yet achieved RICO defendant status by completing a RICO violation. It is obvious that the enhanced penalties of the criminal RICO statute are not available to prosecutors for use against

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(Continued)

similarity between the struggle of common law judges to articulate a precise definition of the concept of 'proximate cause,' and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages." (footnotes omitted)). *See also Blue Shield*, 457 U.S. at 478 ("In applying that elusive concept [proximate cause] to this [antitrust] action, we look . . . to the physical and economic nexus between the alleged violation and the harm to the plaintiff . . . "); and *Radiant Burners, Inc. v. Peoples Gas Co.*, 364 U.S. 656, 660 (1961) *(per curiam)* (To state a claim under §1 of the Sherman Act, "allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires".)

defendants who have not completed a RICO violation. This same rule ought to apply to plaintiffs prosecuting civil RICO claims. There is simply no basis in the legislative history of the RICO statute for allowing RICO civil remedies to be recovered from defendants who were not part of organized crime, as defined by RICO, as of the time they injured the plaintiff.

The purpose and legislative history of RICO and the "by reason of" language used in its civil remedies section all suggest that civil RICO remedies should be available only against defendants who have become part of organized crime by completing a substantive RICO violation or conspiring to do so. The practical consequences of such a rule may not be particularly significant; a plaintiff injured by the first in a series of predicate acts may still have a §1962(d) RICO conspiracy cause of action. As we point out at page 33 of our principal brief, most plaintiffs injured by a first predicate act, committed by a "group of individuals," 18 U.S.C. §1961(4), which is followed by a pattern of such acts will be able to prove that a RICO conspiracy existed as of the time plaintiff was injured. Certainly, this will be true if the predicate acts are committed by defendants within a short time-frame. Any plaintiff who could prove that subsequent predicate acts constituting a pattern occurred shortly after the predicate act that injured plaintiff, could persuasively argue that it was injured "by reason of" a RICO conspiracy.

II. A Civil Cause Of Action Accrues When A Plaintiff Knows Or Has Reason To Know Of Its Injury. A Civil Action Cannot Ripen Into A RICO Action Because Defendants Subsequently Commit A RICO Violation.

A civil cause of action accrues when plaintiff knows or has reason to know of its injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, *reh'g denied*, 401 U.S. 1015 (1971); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984); *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000, 1004 (7th Cir. 1984). A civil cause of action cannot ripen into a RICO cause of action because defendants later commit a RICO violation.

The consequences of allowing a plaintiff to recover under RICO for an injury which is not causally traceable to a completed RICO violation are astonishing.

The most significant consequence is the virtual elimination of the effect of any civil statute of limitations.

A ruling which would allow a plaintiff to allege events occurring after its injury in order to achieve standing to make out a RICO cause of action would not only write the "by reason of" language out of §1964(c), it would also render meaningless any civil statute of limitations which the courts might adopt for RICO. This is so because such a ruling would necessarily render useless the usual civil accrual rule that a cause of action accrues when plaintiff knows or has reason to know of its injury.

Malley-Duff in fact argues, as it must, for the complete abandonment of this rule in civil RICO cases and for the adoption of one of two alternatives. Both alternatives contemplate the "ripening" of existing causes of action into RICO actions at some possibly distant point in the future

when defendants allegedly complete a pattern of racketeering activity.

Malley-Duff argues that this Court should adopt the criminal accrual rule for civil RICO cases and postpone accrual indefinitely by restarting the running of any civil limitations period adopted, each time an act allegedly takes place which is part of a RICO violation. The adoption of the criminal accrual rule in civil cases would extend indefinitely the running of any civil statute of limitations adopted and is inappropriate in civil cases which make injury the focus of the action. Its adoption would mean that a plaintiff could bring a civil RICO action regardless of when it was injured, as long as plaintiff alleged that defendants continued to engage in a pattern of racketeering activity whether directed at plaintiff or not.

The alternative accrual rule proposed by Malley-Duff would start the statute of limitations running when "plaintiff knows or has reason to know of both his injury and the existence of a pattern of racketeering activity."[6] This proposed rule is unworkable for a number of reasons. It would give a plaintiff the opportunity to indefinitely postpone the accrual of its cause of action by selecting the "pattern" evidence it offers against defendant. A plaintiff faced with statute of limitations problems, but in control of the evidence it offers at trial, could select to prove only certain of the predicate acts it suspected defendants had committed and thereby extend for many years the date on which a completed "pattern" is proved. This would put defendants in the strange, schizophrenic position of having to offer evidence to prove they completed a pattern of RICO predicate acts much sooner than plaintiff has proved, and that plaintiff knew or should have known it. This is in fact what

[6]Malley-Duff's Brief, pp. 33-34.

Malley-Duff is advocating in this case. Malley-Duff is arguing that material issues of fact exist concerning when it "knew or should have known about defendants' pattern of racketeering activity."[7] To rebut this, for summary judgment purposes, defendants would have to present evidence to show that: 1) they engaged in a pattern of racketeering activity; 2) that Malley-Duff knew or should have known about it before March 20, 1979 (two years before the action was filed); and 3) that there is no genuine issue of material fact about these issues. In other words, defendants would have to prove beyond a genuine issue of material fact that they were substantively liable to Malley-Duff in order to prevail on the procedural statute of limitations issue.

This proof role-reversal does not occur when the usual civil accrual rule is applied. A defendant can attempt to prove plaintiff was not injured or, if it was, that plaintiff should have known of its injury by some early date, without ever being forced to prove that defendant engaged in wrongful conduct.

Courts cannot realistically expect defendants to respond to a plaintiff's selective "pattern" proofs by proving that they (defendants) were engaged in many more predicate acts and therefore had completed a pattern of predicate acts much earlier than alleged by plaintiff.

This is the fundamental problem with the approach taken by cases like *Bankers Trust v. Feldesman*, 648 F. Supp. 17 (S.D.N.Y. 1986), relied on by plaintiff. *Bankers Trust*, citing a criminal RICO case for support, 648 F. Supp. at 490, would begin the running of the statute of limitations from the date of the last predicate act "on which plaintiff relies." *Id.* at 36. Because the boundaries of

[7] Malley-Duff's Brief, p. 35.

RICO's "pattern" definition are two predicate acts committed within ten years (or more if a defendant is incarcerated), the *Bankers Trust* approach potentially adds ten years (or more) to whatever statute of limitations the courts borrow for civil RICO.

The *Bankers Trust* approach makes the running of whatever statute of limitations is adopted depend on what constitutes a pattern of racketeering activity in a given case, *and* on what "pattern" evidence plaintiff presents. Both will always be to some degree uncertain (Was a pattern established after the second, third, fourth, . . . tenth predicate offense in a given case, and which predicate offenses has plaintiff decided to prove?) and will create uncertainty in the application of any statute of limitations adopted.

Certainty about when the statute of limitations begins to run for civil RICO can only be achieved if evidence not subject to uncertain "pattern" determinations and not readily subject to manipulation by plaintiffs triggers the running of the statute. A plaintiff's injury is just such an event certain.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the judgment of the United States Court of Appeals for the Third Circuit be reversed with instructions that Petitioners' Motion for Summary Judgment on Respondent's RICO claims for termination injuries be granted.

Respectfully submitted,

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